NO. 86 1888

Supreme Court, U.S.
FILED
MAY 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1986

ESTATE OF EUGENE LENNY MARTINELLI,
ROSE MARTINELLI, ADMINISTRATRIX,
and ROSE MARTINELLI, individually,

Petitioners,

vs.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE ARMY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES SUPREME COURT FROM THE COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

SIMON B. JOHN, ESQUIRE
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Feres doctrine is applicable to the case at bar where Decedent was a reservist who died three (3) days after completing weekend military exercises.

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OPINIONS DELIVERED BY COURTS BELOW

The following Opinions have been rendered by Courts below:

1. United States Court of Appeals for the Third Circuit: Opinion of the Court at No. 86-3530, and dated February 27, 1987, affirming the judgment of the United States District Court for the Western District of Pennsylvania, and dismissing Plaintiffs' Complaint.

2. United States District Court for the Western District of Pennsylvania: Final Order at No. 86-693, dated July 30, 1986, granting Defendant, United States of America, Department of the Army, Petition to Dismiss.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioner seeks review of the judgment of the United States Court of Appeals for the Third Circuit, dated February 27, 1987. In that decision, the Court of Appeals affirmed the United States District Court grant of Respondent, United States of America, Department of the Army, Motion to Dismiss the Complaint filed by Plaintiff in the within matter.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 and Supreme Court Rule 17(c).

STATUTES INVOLVED

Petitioner is challenging the doctrine set forth in Feres v. United States, 340 U.S. 135 (1950), and applicability of that holding that military servicemen may not sue the United States Government under the Federal Tort Claims Act to the case at bar. The Federal Tort Claims Act is set forth at 28 U.S.C. Section 2671 et seq. The Act, at 28 U.S.C. Section 2674, provides as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

STATEMENT OF THE CASE

Plaintiff, Rose Martinelli, Administratrix of the Estate of Eugene Lenny Martinelli, and Rose Martinelli, individually, (hereinafter referred to collectively as "Martinelli"), commenced the within action on April 2, 1986 in the United States District Court for the Western District of Pennsylvania, pursuant to the Federal Tort Claims Act (hereinafter referred to as "FTCA"). Jurisdiction at the District Court was invoked pursuant to 28 U.S.C. Section 1346.

The law suit was filed following denial of Martinelli's claim for damage, injury or death of her son, Eugene Lenny Martinelli, from the United States Army. Said claim for administrative relief was timely filed on October 4, 1985, following decedent's death on October 12, 1983 in Uniontown, Fayette County, Pennsylvania.

At the time of his death, Decedent,

Eugene Lenny Martinelli, was a member of the United States Army Reserve. Three (3) days prior to his death he had been participating in reserve corps gas chamber exercises at Camp Dawson, West Virginia. Martinelli alleges in her Complaint that as a result of her son's participation in the army gas chamber exercises, he was exposed to certain gases which resulted in his death due to acute myocardial infarction at age 34, three (3) days after his return home from the exercises.

Respondent, United States Government, Department of the Army, sought and was granted a dismissal of the Complaint pursuant to the doctrine enunciated in Feres v. United States, 340 U.S. 135 (1950). Prior thereto, Martinelli had Noticed the depositions of two (2) members of Decedent's army reserve unit, and the Army sought and was granted a Stay of Discovery pending disposition of its Motion to Dismiss. All motions were granted by Judge Alan Bloch of the United States District Court for the Western District of Pennsylvania.

Martinelli thereafter timely appealed to the United States Court of Appeals for the Third Circuit. On February 27, 1987, the Circuit Court, by Circuit Judges Sloviter and Mansmann, and District Judge Scirica, sitting by designation, affirmed the Order of the District Court and dismissed Martinelli's Complaint.

Martinelli is now seeking certiorari to this Honorable Court for review of the Orders of the lower Courts.

ARGUMENT

Petitioner, Martinelli, respectfully requests that the within Writ be granted, as the Third Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Honorable Court, pursuant to United States Supreme Court Rule 17.1(c).

The Federal Tort Claims Act provides that the United States Government may be sued in tort, 28 U.S.C. Section 2674, in the same manner and to the same extent as a private individual under like circumstances. However, the doctrine enunciated by this Honorable Court in Feres v. United States, 350 U.S. 130 (1950), limits the FTCA by providing that the United States Government is not liable for injuries to servicemen arising out of or in the course of activity incident to service.

This Court has not decided the important question of whether or not military reservists, and particularly the military reservist who died at home, three (3) days

after undergoing military exercises, come within the ambit of the Feres doctrine. A rationale repeatedly cited by the lower Court in applying Feres is the effect of such suits "on the willingness of military personnel to follow directions of their superiors" and because:

> "military decisionmakers might not be willing to act as quickly and forcefully as is necessary. . . if they know they will subsequently be called into a civilian court to answer for their actions."

Martinelli v. United States, No. 86-3530, (3rd Cir. 1987) Slip Op. at 4, citing, Jaffee v. United States, 663 F.2d 1226 (3rd Cir. 1981), en banc, cert. denied, 456 U.S. 972 at 1232 (1982). However, this rationale is inapplicable to the case at bar where immediate decisions were not in issue; to the contrary the gas chamber exercise was a weekend training session and none of the exigencies of field or combat situations were present. Moreover, it is precisely the above rationale which prevents the injured, the

deceased and their survivors from insuring that such incidents do not occur in the future, particularly where, as in the case at bar, the Complaint alleges exposure to noxious gases.

Clearly, the Martinelli case constitutes an exception to the Feres doctrine. Here, the decedent returned from weekend exercises with no apparent injury as a result therefrom until his death three (3) days later. Therefore, Martinelli's cause of action under both a wrongful death and a survival theory did not accrue until three (3) days after decedent left the control and supervision of the military and his superiors.

Since Federal Courts would apply the law of the jurisdiction where the injury occurred see, Gallick v. United States, 542 F. Supp. 188 (D.C. Pa. 1982), it is clear that Martinelli had no cause of action until his "injury" occurred, in this case, his death three (3) days after he left the control and supervision of the military. Under

Pennsylvania Wrongful Death and Survival Statutes, 42 Pa. C.S.A. Section 8301 and 8302, petitioner's cause of action did not accrue until after decedent was at home and on civilian time. It was while decedent was at home that his injuries resulting from the gas chamber exercise manifested themselves. Therefore, his ability to pursue an FTCA action should be governed by his status at the time the cause of action accrued, rather than the time of the tortious conduct.

Petitioner's action must be permitted to proceed, as it is similar to the situation in United States v. Brown, 348 U.S. 110 (1954), where a discharged veteran was permitted to proceed with his FTCA suit for injuries suffered as a result of government negligence in performing surgery. Although the negligence occurred after Brown was discharged, his original injury occurred while in the military. Clearly, the doctrine set forth in Brown is applicable to the case at bar, since Martinelli's injury occurred while

under military control and supervision, but did not manifest itself or give rise to a cause of action, until he had completed the exercise and been home for three (3) days.

Petitioner further submits that the purpose of the FTCA is defeated if all potential litigants, including survivors and relatives, are barred from invoking it by virtue of an indirect link to the military. Reservists, such as Decedent-Martinelli, lead civilian lives most of the time and do not receive many of the benefits incident to full-time military service. Although other courts have held that the Veterans Benefits Act, 38 U.S.C. Section 101 et seq. provides a remedy for injured or deceased servicemen, such a remedy is neither sufficient, nor intended by Congress to be an exclusive remedy for veterans. Clearly, the availability of veterans benefits in certain situations should not bar an FTCA action by heirs and survivors, particularly where, as in the case at bar, no benefits have been paid to or on behalf of

Decedent-Martinelli.

Moreover, it is inequitable for survivors and relatives of deceased military reservists to be denied their ability to pursue their remedies where they have no control over the military decision-making process. The consideration given to the need for discipline and control within the military, certainly does not apply to relatives and survivors of the deceased, since they are civilians.

Martinelli further submits that Feres bars litigants not only from pursuing their claims against the military, but from ascertaining the reasons behind incidents such as the one giving rise to Mr. Martinelli's death. While Martinelli sought discovery and Noticed the depositions of members of Mr. Martinelli's reserve corps, the depositions were never held as the United States District Court granted a Motion for Stay of Discovery, pending outcome of the Government Motion to Dismiss. The withholding of information surrounding the gas chamber exercise

constitutes not only an impermissible infringement upon Mr. Martinelli's constitutional rights, but denies his survivors all possible means of obtaining information regarding his premature and unexpected death.

Accordingly, Petitioner submits that cases such as the one at bar should be decided by the District Courts on a case by case basis after discovery has been undertaken and the extent of the military need for secrecy determined. Clearly, there are less restrictive alternatives to the dismissal of the Complaint at the outset, and a case by case decision making process, based upon discovery and the information contained therein will provide better protection for the injured and deceased. It is clear that at least one Circuit Court has adopted a case by case decision making process. Stanley v. United States, 786 F.2d 1490, (11th Cir. 1986), thereby creating a conflict among the circuits on this issue.

The Third Circuit Court of Appeals Opinion in the case at bar indicated that action regarding the Feres doctrine should be taken by the legislature: Martinelli v. United States, No. 86-3530, Slip Op. at 6. However, Congress has shown that is unable to reach a resolution of this issue. Specifically, a bill was introduced in the House of Representatives in 1986 seeking to permit suits against the government for medical malpractice committed in military hospitals or clinics; however, that bill did not survive the judiciary committee. Therefore, it is not clear whether the present legislature will address the Feres doctrine by passing the bill introduced by Rep. Barney Frank of Massachusetts, although it was approved by the House Judiciary Committee on May 18, 1987. Even if same were ultimately passed and introduced into law, it would have neither the far-reaching nor the retroactive effect necessary to redress the wrongs suffered by Martinelli.

Finally, since this Honorable Court has granted certiorari in Stanley v. United States, No. 86-393, cert. granted, 55 U.S.L.W. 3411 on December 8, 1986,[1] Martinelli submits that the time is ripe for this Court to determine the viability of the Feres doctrine with respect to reservists whose causes of action do not accrue until after they have left the control and supervision of the military.

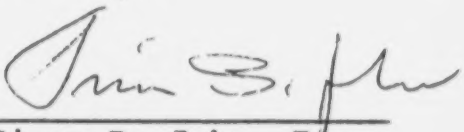
[1] It is Petitioner's understanding that oral argument was held in Stanley v. United States, on April 21, 1987 and that this Honorable Court has not yet rendered a decision in that matter.

CONCLUSION

For the foregoing reasons and arguments, Martinelli respectfully requests the within Writ of Certiorari be granted.

Respectfully submitted,

JOHN & JOHN

BY 

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DATED: May 26, 1987

APPENDIX

A. Copy of Opinion and Order of the United States Court of Appeals for the Third Circuit at No. 86-3530 dated February 27, 1987.

B. Copy of Final Order of the United States District Court for the Western District of Pennsylvania at No. 86-693 dated July 30, 1986.

C. Copy of letter from Department of Army, United States Army Claims Service, dated November 27, 1985 and denying Martinellis' claim for damges.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-3530

ESTATE OF EUGENE LENNY MARTINELLI,
ROSE MARTINELLI, ADMINISTRATRIX,
and ROSE MARTINELLI, individually,

Appellants

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE ARMY

On Appeal from the United States District
Court for the Western District
of Pennsylvania

(D.C. Civil No. 86-693)

Submitted Under Third Circuit Rule 12(6)
February 18, 1987

Before: SLOVITER and MANSMANN, *Circuit Judges*,
and SCIRICA, *District Judge**

(Opinion filed February 27, 1987)

Simon B. John
John & John
Uniontown, PA 15401

Attorney for Appellant

---

* Hon. Anthony J. Scirica, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

J. Alan Johnson
United States Attorney
Bonnie R. Schlueter
Assistant U.S. Attorney
Pittsburgh, PA 15219

Attorneys for Appellee

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Appellant Rose Martinelli appeals from the district court dismissal of her Federal Tort Claims Act (FTCA) suit against the United States for damages for the death of her son allegedly caused by injuries received while serving as a member of the United States Army Reserves. The district court held that suit was barred as a matter of law because of the doctrine expressed in *Feres v. United States*, 340 U.S. 135 (1950), that military servicemen may not sue the United States government under the FTCA for injuries arising during service in the military. This court has not previously considered the application of the *Feres* doctrine to military reservists. Our review over this issue is plenary.

II.

In *Feres*, the Court gave several reasons for its preclusion of an FTCA suit alleging that negligence caused the death of a serviceman trapped in a barracks during a fire while on active duty. The Court referred to the availability of assured compensation, stating that because injured servicepersons may seek recovery under the Veterans' Benefits Act, 38 U.S.C. §§ 301-363, a remedy under the FTCA is unnecessary.

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

340 U.S. at 144. Martinelli argues that military reservists are different because no such relief is available to them. However, as the government points out, there is provision for such coverage because under the Veterans' Benefits Act reserve duty is expressly encompassed within "inactive duty training", 38 U.S.C. § 101(23), and the statutory definition of veteran includes one who became disabled or died during a period of "inactive duty training". 38 U.S.C. § 101(2), (24).

The *Feres* Court also noted that the FTCA imposed liability on the government only "in the same manner and to the same extent as a private individual under such circumstances." 340 U.S. at 141 (quoting 28 U.S.C. § 2674). The Court stated that there is no liability in the private sphere analogous to that asserted against the United States by or on behalf of a serviceman injured while on military duty. 340 U.S. at 141-42. Based on this rationale, later cases have held that the *Feres* doctrine is based primarily on the effect of lawsuits on military effectiveness. Thus, in *United States v. Brown*, 348 U.S. 110 (1954), the Court stated that the *Feres* doctrine was based on the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *Id.* at 112. More recently, in *United States v. Shearer*, 105 S. Ct. 3039 (1985), the Court again stated that the important focus in considering the applicability of the *Feres* doctrine is "whether the suit requires the civilian court to second guess military decisions." *Id.* at 3043. *See also Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977).

The allegation of Martinelli's complaint, which we must accept as true in the procedural posture of this case, is that Martinelli's son died as a result of exposure to noxious gases during his participation as a civilian reserve member in gas chamber exercises. Martinelli alleges the exercises were conducted negligently, carelessly and recklessly. In *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (in banc), *cert. denied*, 456 U.S. 972 (1982), this court held that *Feres* precluded recovery by a serviceman who developed cancer after what the complaint claimed was intentional exposure to radiation during a military exercise. Judge Higginbotham, writing for the majority, stated that suits for service injuries are prohibited because of "their effect on the willingness of military personnel to follow directions of their superiors" and because "[m]ilitary decisionmakers might not be willing to act as quickly and forcefully as is necessary . . . if they know they will subsequently be called into a civilian court to answer for their actions." *Id.* at 1232. The rationale used by this court in *Jaffee* is equally applicable to Martinelli. Suits by reservists, albeit civilian, for injuries received while on reserve training in military exercises would have the same consequences.

Accordingly, we hold that the *Feres* doctrine bars FTCA suits by or on behalf of persons serving in the United States Military Reserves because the same rationale that precludes suits by or on behalf of servicepersons is equally applicable to reservists. Our decision is in accord with that of several other courts of appeals that have addressed the issue. *See Mattos v. United States*, 412 F.2d 793, 794 (9th Cir. 1969) (per curiam) (court stated, without further discussion, that, "[t]he rationale of *Feres* applies with equal force to reservists."); *United States v. Carroll*, 369 F.2d 618.

620 (8th Cir. 1966) ("[t]here is no doubt that the *Feres* decision applies also to reservists."); *accord O'Brien v. United States*, 192 F.2d 948 (8th Cir. 1951); *Layne v. United States*, 295 F.2d 433, 434-36 (7th Cir. 1961), *cert. denied*, 368 U.S. 990 (1962) (widow of Indiana National Guardsman fatally injured while on duty as part of Reserve not permitted to sue United States under FTCA because of *Feres* doctrine).

Martinelli argues that we should engage in a case-by-case review to ascertain if application of *Feres* is appropriate. However, in *Jorden v. National Guard*, 799 F.2d 99 (3d Cir. 1986), we rejected the argument that *Feres* requires us to inquire in each case whether judicial review will unduly interfere with military operations. Instead, we reaffirmed our view, held as well by the majority of courts, that *Feres* is a *per se* bar of damage actions against the United States and military officers arising out of injuries to military personnel. *Id.* at 107-08. *Contra United States v. Stanley*, 786 F.2d 1490, 1499 (11th Cir. 1986), *cert. granted*, 107 S. Ct. 642 (U.S. Dec. 8, 1986) (No. 86-393).[1]

In rejecting plaintiff's appeal, we feel compelled to point out that attempts by members of this court to limit the *Feres* doctrine have been consistently unsuccessful. The panel opinion in *Jaffee* that would have held that *Feres* does not grant absolute immunity to military and civilian defendants when charged with

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1. We find no error in the district court's rejection of appellant's argument that because her son did not die until three days after the completion of the military exercise, *Feres* does not apply. The district court stated, "[t]he determinative issue is not whether the serviceman is under the control or supervision of the military at the time of death, but rather whether the serviceman was under the control or supervision of the military at the time of the accident." App. at 58a.

intentional, unauthorized tortious conduct, *see Jaffee v. United States*, 663 F.2d at 1249 (Gibbons dissenting), was rejected by the court in banc. 663 F.2d at 1226. This court's opinion that the survivor of an off-duty serviceman could recover from the government for its negligent failure to prevent his murder by another off-duty serviceman was reversed by the Supreme Court in *United States v. Shearer*, 105 S. Ct. 3039 (1985), *reversing* 723 F.2d 1102 (3d Cir. 1984). It is therefore evident that any relaxation in the *Feres* doctrine must come from Congress.

For the foregoing reasons, we will affirm the order dismissing the complaint.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ESTATE OF EUGENE LENNY MARTINELLI, ROSE MARTINELLI, Administratrix, and ROSE MARTINELLI, individually,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 86-693
UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY,	)	
Defendant.	)	

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs, estate of Eugene Lenny Martinelli, by Rose Martinelli, administratrix, and Rose Martinelli, individually, brought this action under the Federal Tort Claims Act, 28 U.S.C. Sec. 1346(b) and 2671, et. seq., to recover damages stemming from the death of Eugene Lenny Martinelli allegedly caused by the negligence or wrongful acts or omissions of defendant United States of America, Department of the Army. Before the Court is defendant's motion to dismiss plaintiffs' complaint pursuant to Rules

12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated, defendant's motion will be granted.

On a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the Court must limit its considertaion to the allegations of the complaint. Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978). Further, the Court must construe all allegations of the complaint as true. Scheuer v. Rhodes, 416 U.S. 232 (1974). The Supreme Court has stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted).

Construing the allegations of plaintiffs' complaint as true, plaintiff/decedent Eugene Lenny Martinelli was a civilian reserve member of the United States Army, participating in gas chamber exercises at Camp Dawson, West

Virginia, on or about October 9, 1983. As a result of the negligence, carelessness, and recklessness of defendant in conducting said gas chamber exercises, decedent was exposed to gases which resulted in his death on October 12, 1983, all to the great loss and damage of decedent, his estate, and plaintiff-mother, Rose Martinelli. (Plaintiffs' complaint, p. 9 - p. 11).

The general rules governing the liability of the United States to servicemen under the Federal Tort Claims Act is stated in Feres v. United States, 340 U.S. 135, 71 S.Ct.153, L.Ed. 152 (1950). There, the Supreme Court held that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service. 340 U.S. at 146. Moreover, there is no doubt that the Feres doctrine also applies to reservists. Mattos v. United States, 412 F.2d 793 (9th Cir. 1969); United Statesv. Carrol, 369 F.2d 618 (8th Cir. 1966); O'Brien v.

United States, 192 F.2d 948 (8th Cir. 1951). In Mattos, supra, the plaintiff's death was caused by a motor vehicle accident while he was engaged in a weekend drill. In this action, plaintiffs seek to distinguish that case upon the ground that Eugene Lenny Martinelli's actual death occurred several days after the gas chamber exercises and not while he was under the supervision or control of the military. The Court finds no merit in this distinction.

Plaintiffs are frivolously attempting to make the actual time of death an issue. The determinative issue is not whether the serviceman is under the control or supervision of the military at the time of death, but rather whether the serviceman was under the control or supervision of the military at the time of the accident. See United States v. Carrol, supra. In the present case, Eugene Lenny Martinelli's injuries and resulting death clearly arose out of activities incident to service. It makes no difference whether

his death occurred simultaneously with his injuries or several days thereafter.

In addition, the Federal Tort Claims Act does not provide jurisdictional basis for plaintiffs' claim. Although the Act is a general waiver of sovereign immunity for tort claims involving money damages against the United States, the Supreme Court, as previously noted, has established an exception through the Feres doctrine for injuries arising out of the course of activity incident to military service. Feres, supra.; Stencel Aero Engineering Corporation v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977); Chappel v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).

Because the plaintiffs have failed to state a claim upon which relief can be granted and the Federal Tort Claims Act provides no jurisdictional basis for plaintiffs' claim, defendant's motion to dismiss is granted.

An appropriate Order will be issued.

Date: July 30, 1986

/s/Alan N. Bloch
United States District
Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ESTATE OF EUGENE LENNY MARTINELLI, ROSE MARTINELLI, Administratrix, and ROSE MARTINELLI, individually,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 86-693
UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY,	)	
Defendant.	)	

JUDGMENT ORDER

AND NOW, this 30th day of July, 1986, upon consideration of Defendant's Motion to Dismiss filed in the above captioned matter on June 9, 1986,

IT IS HEREBY ORDERED that said Motion is GRANTED and that judgment be, and hereby is, entered in favor of Defendant and against Plaintiffs.

/s/Alan N. Bloch
United States District Judge

Simon B. John, Esquire
96 East Main Street, Uniontown, PA 15401.

Asst. U.S. Atty. Barbara M. Carlin
633 U.S. Post Office and Courthouse
Pittsburgh, PA 15219.

DEPARTMENT OF THE ARMY
U.S. ARMY CLAIMS SERVICE
OFFICE OF THE JUDGE ADVOCATE GENERAL
FORT GEORGE G. MEADE, MARYLAND 20755-5360

NOV. 27, 1985

Reply to
Attention of:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

General Claims Division
86-02-04-0109

Rose Martinelli
Apt. B-104 Lawn Avenue
Uniontown, Pennsylvania 15401

Dear Mrs. Martinelli:

This notice constitutes final administrative action on the claim of Rose Martinelli against the United States in the amount in excess of $200,000.00 for the death of Eugene Martinelli allegedly as a result of participating in a gas chamber exercise at Camp Dawson, West Virginia on October 9, 1983.

Applicable law and regulations require that your claim be for a sum certain. Accordingly your claim is interpreted to be a demand for $200,000.00. The claim is denied as it arose incident to the Service of the decedent in the United States Army.

I am required by regulation to inform you that if you are dissatisfied with the action taken on your claim, you may file suit in an appropriate United States District Court not later than six months from the date of mailing of this letter or your remedy will be forever barred. This is not intended to imply than any such suit, if filed, would be successful.

Sincerely,
/s/Joseph H. Rouse
Chief, General Claims
Division

Copy Furnished:
HQDA (DAJA-LTT)
Oakdale, PA

No. 86-1888

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROSE MARTINELLI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EUGENE LENNY MARTINELLI, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Mattos v. *United States*, 412 F.2d 793 (9th Cir. 1969) 4
Stanley v. *United States*, 786 F.2d 1490 (11th Cir. 1986), rev'd, No. 86-393 (June 25, 1987) 4
United States v. *Brown*, 348 U.S. 110 (1954) 5
United States v. *Carroll*, 369 F.2d 618 (8th Cir. 1966) 4
United States v. *Johnson*, No. 85-2039 (May 18, 1987) 4
United States v. *Shearer*, 473 U.S. 53 (1985) 4

Statutes:

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1888

ROSE MARTINELLI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EUGENE LENNY MARTINELLI, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner alleges that her son died as a result of injuries he received incident to his service in the United States Army Reserve. She contends that the United States is liable in damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, despite the rule of *Feres* v. *United States*, 340 U.S. 135 (1950), because her son was a reservist and died at home.

1. Petitioner is the mother and administratrix of Eugene Lenny Martinelli, who, as an Army reservist, participated in routine gas chamber exercises at Camp Dawson, West Virginia, on October 9, 1983, designed to test his ability to put on a gas mask quickly. During the standard exercises Martinelli was placed in a gas chamber and, after he put on a gas mask, the gas chamber was activated. Petitioner alleges that during the exercises her son was exposed to noxious gases, resulting in his death at home three days later. The United States moved to dismiss

the complaint for failure to state a claim, asserting that, under *Feres,* petitioner's suit is barred as a matter of law because he was injured incident to military service.

The district court dismissed the complaint (Pet. App. 26-31). It noted that, under *Feres,* "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service" (*id.* at 28). Citing a number of court of appeals decisions, the court added that "there is no doubt that the *Feres* doctrine also applies to reservists" (*ibid.*). The court further noted that "[p]laintiffs are frivolously attempting to make the actual time of death an issue" (*id.* at 29). It concluded that since the complaint alleged that Martinelli's death arose out of activities incident to military service, "[i]t makes no difference whether his death occurred simultaneously with his injuries or several days thereafter" (*id.* at 29-30).

The court of appeals affirmed (Pet. App. 20-25). It held, "in accord with * * * several other courts of appeals," that "the *Feres* doctrine bars FTCA suits by or on behalf of persons serving in the United States Military Reserves because the same rationale that precludes suits by or on behalf of servicepersons is equally applicable to reservists" (*id.* at 23). The court of appeals first observed that under the Veterans' Benefits Act, 38 U.S.C. 101 *et seq.*, "reserve duty is expressly encompassed within 'inactive duty training', 38 U.S.C. § 101(23), and the statutory definition of veteran includes one who became disabled or died during a period of 'inactive duty training' " (Pet. App. 22 (citing 38 U.S.C. 101(2), (24)); therefore reservists injured incident to service are entitled to veterans' benefits.[1] The court of appeals next stated that FTCA

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[1] Petitioner states (Pet. 13-14) that she has received no veterans' benefits. She also appended to her petition a letter from the Army denying a claim for more than $200,000 (Pet. App. 33-34). It should be noted that that letter is not a denial of an application for veterans' benefits. Petitioner does not state whether she has applied for

suits for service-connected injuries are barred "because of 'their effect on the willingness of military personnel to follow directions of their superiors' and because '[m]ilitary decisionmakers might not be willing to act as quickly and forcefully as is necessary . . . if they know they will subsequently be called into a civilian court to answer for their action' " (Pet. App. 23, quoting *Jaffee* v. *United States*, 663 F.2d 1226, 1232 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982)). The court of appeals concluded that suits by reservists "for injuries received while on reserve training in military exercises would have the same consequences" (Pet. App. 23).[2]

The court of appeals found "no error in the district court's rejection of appellant's argument that because her son did not die until three days after the completion of the military exercise, *Feres* does not apply" (Pet. App. 24 n.1).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

Petitioner primarily contends (Pet. 9-10) that the Court should grant review in this case to consider whether military reservists come within the ambit of the *Feres* doctrine. However, there is plainly no warrant for review by this Court. The court of appeals' holding—that the *Feres* doctrine bars FTCA suits by or on behalf of military reservists because the same rationale that precludes suits by

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veterans' benefits; of course, a person must apply in order to obtain benefits (38 U.S.C. 3001(a)).

[2] The court also rejected petitioner's argument that courts should engage in a case-by-case review to determine whether the particular suit would undermine military discipline and effectiveness, instead holding that "*Feres* is a *per se* bar of damage actions against the United States and military officers arising out of injuries to military personnel" (Pet. App. 24).

or on behalf of servicemembers is equally applicable to reservists—is in accordance with settled law. All the courts of appeals that have considered the question have concluded that *Feres* applies to reservists. See, *e.g.*, *Mattos* v. *United States*, 412 F.2d 793, 794 (9th Cir. 1969) (per curiam); *United States* v. *Carroll*, 369 F.2d 618, 620 (8th Cir. 1966); *Layne* v. *United States*, 295 F.2d 433, 434-436 (7th Cir. 1961). Moreover, those decisions are plainly correct, as there is no meaningful difference between a reservist injured incident to military service and a servicemember so injured.[3]

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[3] Petitioner suggests (Pet. 15), relying on *Stanley* v. *United States*, 786 F.2d 1490 (11th Cir. 1986), rev'd, No. 86-393 (June 25, 1987), that a case-by-case analysis is appropriate to determine whether proceeding with this case would undermine military discipline and effectiveness. While the Court reversed the Eleventh Circuit's decision in *Stanley* without addressing its case-by-case methodology, it is clear from the Court's recent decision in *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), that no such analysis is warranted.

The Eleventh Circuit concluded in its decision in *Johnson* that a case-by-case inquiry was required where a servicemember was injured as the result of negligence on the part of a civilian federal employee; the Eleventh Circuit subsequently extended its case-by-case approach to all *Feres* cases in *Stanley*. In reversing in *Johnson*, this Court engaged in no inquiry as to whether the suit at issue would undermine military discipline and effectiveness, but instead concluded that suits brought by servicemembers injured incident to service "are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness' " (slip op. 9, quoting *United States* v. *Shearer*, 473 U.S. 52, 59 (1985) (emphasis in *Shearer*)). The Court "reaffirm[ed] the holding of *Feres* that 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service' " (slip op. 10, quoting *Feres*, 340 U.S. at 146). It thus rejected the case-by-case approach.

Petitioner also suggests (Pet. 14) that the rule of *Feres* should be applied differently where, as here, suit is brought by a representative of a servicemember rather than by a servicemember. The Court disposed of such a claim in *Shearer* by noting that "[i]t is immaterial that this suit was brought by a representative of the serviceman; indeed, *Feres* itself was brought by an executrix" (473 U.S. at 58 n.3).

Petitioner also asserts (Pet. 11-13) that the Court should grant certiorari to consider whether *Feres* bars this suit because Martinelli "returned from weekend exercises with no apparent injury as a result therefrom until his death three (3) days later." In support of this contention, petitioner argues that this case is governed by *United States* v. *Brown*, 348 U.S. 110, 112 (1954), where the Court held that a veteran's FTCA suit for an injury which was sustained *after* he was discharged from military service was not barred by *Feres*. *Brown* is plainly inapposite because petitioner does not dispute that her son's injury occurred "while [he was] under military control and supervision" (Pet. 12-13). If petitioner's allegation that Martinelli's death resulted from his participation in the gas chamber exercises at Camp Dawson is true, Martinelli's injury occurred incident to military service, regardless of when it became manifest. Thus, as the district court stated (Pet. App. 29), petitioner's contention that this case is not barred by *Feres* because Martinelli died at home is frivolous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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